PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed August 8, 2005

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **James Carlisle Regan**, A Member of the State Bar.	))))))	**00-O-10318** **OPINION ON REVIEW**

A State Bar Court hearing judge recommended that Respondent, James Carlisle Regan, be suspended from the practice of law for two years, stayed on conditions including a seventy-five day actual suspension. The judge found respondent culpable of pursuing an appeal contrary to the wishes of his clients, misleading the appellate court about his clients' wishes, failing to communicate with his clients and failing to return his client's file upon request.

On appeal, respondent contends that the Hearing Judge erroneously found culpability because the State Bar did not provide clear and convincing evidence to establish that he violated any of the asserted charges. Upon our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207) we adopt all of the Hearing Judge's findings with respect to culpability. We also find additional aggravation above that of the Hearing Judge. For the reasons below, we adopt the findings of culpability and adopt the Hearing Judge's disciplinary recommendation, adding a recommendation that respondent be ordered to comply with California Rules of Court, rule 955.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent has practiced law in California since 1981, and he has no prior record of discipline. He has had varied civil practice experience. His past work included general corporate work, labor law, creditor's rights, bankruptcy, international law, litigation, real estate, and some "film finance work." Over his legal career, respondent had the opportunity to work

with many different clients.

Elodie McKee and Don Porco hired respondent to represent them in a claim against the City of Burbank (Burbank) and several Doe defendants in August 1997. Initially, McKee was the one who sought out respondent because he was a semi-prominent attorney in the Glendale and Burbank area. McKee was also aware of his work as the chairman of the Glendale-Burbank Republican committee. McKee believed she had a negligence and slander claim against Burbank. After discussing the merits of her claim, McKee introduced respondent to Porco. Porco had been active in appearing before the Burbank City Council to protest different acts by city officials. McKee believed that respondent could help Porco with a similar slander claim that he wanted to bring against Burbank and several individuals. Respondent undertook the representation believing his connections with the Burbank city council members would help the case come to an early settlement.

The main action arose from remarks made on a telephone hotline allegedly organized by a Burbank Police Lieutenant, Don Brown, designed to comment on local politics.[1] The hotline telephone number was publicized in the local press. Disparaging remarks concerning Porco's character were broadcast on the hotline, and respondent combined Porco's complaint with the separate negligence complaint McKee had against Burbank, making them co-plaintiffs in the same action. McKee and Porco sought damages for violations of their civil rights, defamation, conspiracy, negligence, and intentional infliction of emotional distress.

Porco and McKee signed respondent's contingency fee agreement letter on June 9, 1998, in which respondent outlined the percentages of any potential award to be paid to him as his fee.[2] The letter also set forth an hourly rate of $200 to be paid for any work related to an appeal.

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[1]There is no evidence before us to suggest that Don Brown operated the hotline for any purpose other than as an outlet for personal political views.

[2]The record is unclear whether McKee and Porco signed an earlier fee agreement letter.

Concurrent with that letter, respondent had McKee and Porco sign a conflict of interest waiver.[3]

Respondent filed the initial complaint on September 12, 1997, which was amended on October 19, 1998. The amended complaint substituted Don Brown and Charles Lombardo for the Doe defendants. After being named defendants, Brown and Lombardo moved to strike the amended complaint on the ground that it was a strategic lawsuit against public participation (SLAPP) by McKee and Porco.[4] The court granted the Brown and Lombardo motion to strike, as McKee and Porco had not met their burden to produce competent evidence that the statements made on the hotline were defamatory or otherwise actionable. An attorney fee award of $15,662.50 was entered against McKee and Porco. After the SLAPP award, Burbank filed a summary judgment motion to dismiss the original lawsuit filed by McKee and Porco, based on a lack of any causal connection between the alleged acts and conduct for which Burbank was legally responsible. Burbank's motion was granted on January 20, 1999.

Following the SLAPP award, but before the summary judgment that dismissed the original lawsuit was granted, McKee and Porco met with respondent on January 16, 1999. At this meeting, both McKee and Porco wrote a check to respondent in the amount of $250. Porco's check was delivered with the notation "Don Porco - Appeal" on the memo line, and McKee's check stated "For Appeal" on the memo line. The purpose of these checks was the subject of considerable dispute at respondent's disciplinary hearing. McKee and Porco both testified that the checks were written as a loan to respondent because he was having difficulty

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[3]Respondent failed to outline any "actual and reasonably foreseeable adverse consequences" of a potential future conflict as required by California Rules of Professional Conduct, rule 3-310(A)(1)-(A)(2) and (C).

[4]See e.g., *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57, 59-60, for the origin of the acronym SLAPP and the public policy involved in California's anti-SLAPP law invoked by those resisting SLAPP suits they deem chilling of their exercise of constitutional speech or petition rights.

paying his home mortgage. Respondent testified that the checks were delivered as payment for fees associated with filing the appeal that his clients wanted to pursue.[5] The Hearing Judge resolved this issue in favor of respondent. Respondent also testified that he intended to use at least one of the checks for the filing fees associated with appealing the SLAPP award. The other check was to cover costs associated with appealing the subsequent summary judgment motion, which respondent believed was coming. Respondent testified that the checks were deposited into his client trust account and that the money was used to file the appeal and the supplemental notice of appeal.

No contact occurred between respondent and his clients for approximately one month after their January meeting. On February 18, 1999, McKee placed three telephone calls to respondent and testified that respondent hung-up on her several times after she informed him, during the initial call, that she and Porco did not want an appeal. McKee testified that when she telephoned respondent she said "Jim, we need to talk. Don and I don't want an appeal," and upon hearing that, respondent immediately hung-up the telephone.[6] The following day, February 19, 1999, respondent filed a Notice of Appeal on behalf of McKee and Porco appealing the SLAPP award.

Respondent conceded that he did not inform Porco or McKee in writing of his filing an appeal on their behalf, testifying that "I don't know that it's wise to put so many things in writing." Porco testified that he learned from respondent in a February 24, 1999, phone call that the appeal had been filed. Upon learning that information, Porco insisted that his name be withdrawn from the appeal. At respondent's disciplinary hearing, Porco testified that during this conversation he stated that "I told [respondent] to get my name off of it. I didn't want that

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[5]The local filing fee for an appeal during this time period was $250.

[6]Telephone records indicated that three calls were placed by McKee to respondent of less then one minute in duration on that date.

appeal. I told him take my name off it." Porco also testified that respondent never had his approval to file an appeal on his behalf.

McKee filed a notice of substitution of attorney on March 1, 1999, in the Los Angeles Superior Court, which had jurisdiction over the original, and continuing, Burbank lawsuit. Her intention was to fire respondent and substitute herself in pro. per. Although the reason is unclear, the court continued to recognize respondent as the attorney of record.

A hearing was held on March 5, 1999, to determine the amount of the award for costs and fees relating to the summary judgment granted on behalf of Burbank. Respondent had been served papers regarding the hearing, but testified that he failed to appear because Porco had told him the hearing had been removed from the calender. McKee represented herself as a pro se litigant and was the only person to appear at the hearing. McKee indicated to the judge that respondent had abandoned her case and failed to communicate with his clients. Because respondent was still the attorney of record, the hearing was postponed until April 15, 1999.

Respondent and Porco appeared without McKee at the subsequent hearing on April 15, 1999. The court questioned respondent regarding his status as McKee's attorney. Respondent represented to the court that he had sent McKee a substitution of attorney form, but that she had failed to return the form. Respondent further explained to the court that he was making a special appearance on her behalf. The court indicated that it was going to enforce any judgment on behalf of Burbank against respondent as well as his two clients. Respondent unsuccessfully protested that decision, and the ultimate result of the hearing was an award for attorney's fees in the amount of $62,928.38, against Porco, McKee, and respondent, jointly and severally.

Immediately following the hearing, Porco and respondent discussed the judgment outside the courtroom. Respondent testified at his disciplinary hearing that this conversation was the relevant conversation regarding their pursuit of the appeal. Respondent claimed that he explained to Porco how the judgment against them would actually help them on appeal, and that

at no time did Porco state he did not want to be a part of the appeal. Also, respondent testified that he did not ask McKee and Porco to sign a new conflict of interest letter once they all became responsible for the judgment in favor of Burbank although, at that time, respondent understood that an actual conflict could exist between Porco and McKee.

Porco's recollection of the conversation on April 15, 1999, differed from that of respondent. Porco testified that, during this conversation, respondent stated he would not pay the judgment and instead would declare bankruptcy. Porco also testified that he requested his case file from respondent during this conversation. Respondent never complied with that request.

On April 30, 1999, respondent filed a supplemental notice of appeal on behalf of McKee, Porco, and himself to include the $62,928.38 award against all three parties. This was the same day the judgment awarding the attorneys fees to Burbank was entered. On May 6, 1999, the Notice of Entry of Judgment was filed regarding the awarded fees.

On May 6, 1999, McKee and Porco sent a certified letter to respondent, which he received on May 10, 1999, that expressed their disappointment with how respondent handled their case. McKee and Porco complained that respondent did not communicate with them, allow them to make the ultimate decisions regarding their case, or honor Porco's request to return their case file. Additionally, the letter stated that respondent never had his clients' express approval to pursue an appeal on their behalf. At the conclusion of the letter, McKee and Porco stated they would not interfere with a personal appeal by respondent in order to protect his own interests. Porco also stated that "as far as I am concerned [the Burbank lawsuit] was finalized on April 15, 1999 [*sic*] by Judge Ouderkirk." Further, McKee and Porco requested respondent notify them of his intentions as soon as possible.

Respondent never replied to this letter, and continued throughout 1999 to file several applications for an extension of time in which to file the Appellants' Opening Brief. McKee and

Porco were named as appellants on each application, and respondent never notified either party that he had sought the extensions.

After several months without any contact from respondent, on November 17, 1999, Porco sent respondent a letter in which he reiterated that respondent did not have authority to file an appeal on behalf of himself or McKee. Porco also complained of respondent's failure to communicate, claiming he had not been contacted by respondent for seven months. On December 7, 1999, McKee sent respondent a similar letter, and on the same date McKee and Porco also filed a motion in the Court of Appeal to dismiss respondent as the attorney of record along with a motion to dismiss the appeal.

Respondent did not contact his clients after receiving their letters; instead, he proceeded to file the appellant's opening brief on behalf of McKee, Porco, and himself on December 15, 1999. On December 23, 1999, McKee and Porco sent respondent a letter that unequivocally discharged respondent for failing to communicate.[7] The letter also requested that respondent sign and return a substitution of attorney form, which respondent did not complete or return.

On January 5, 2000, the Court of Appeal granted McKee and Porco's December 7, 1999, motion and issued an order dismissing the February 19, and April 30, 1999 appeals.

Respondent then filed a motion to vacate " 'Order Dismissing Appeal;' To Reinstate Appeal; To Strike 'Motion' Filed by Individual Plaintiffs-Appellants 'In Propria Persona;' " on January 20, 1999, on behalf of himself, McKee, and Porco. In the motion to vacate, respondent

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[7]This letter read in pertinent part as follows: "Today we learned that you filed an appendix and opening brief with the Second Appeal [*sic*] Court, and it should have been clear to you from the December 7, 1999 motions we filed to dismiss both you and the appeals that we sent you, and again you did not phone us or write to us what you were doing behind our backs and without our knowledge, that we want nothing more to do with you and your financial harm that you are continuing to try to cause us with your actions. . . .You are fired Mr. Regan and we told you in our previous correspondence that we did not want any more financial debt incurred to us with an appeal, and you never phoned us nor wrote to us as we asked you to do."

stated that McKee was mentally ill, and Porco was senile.[8] Respondent stated that McKee "imagines that she is a lawyer" and Porco "has no idea of what is happening [and] is under Ms. McKee's influence." Throughout the motion, respondent made repeated references to McKee's mental incompetence and stated that "[n]either Mr. Porco nor Ms. McKee actually want the appeal dismissed." (Emphasis in original.) Respondent also stated that "[McKee and Porco] specifically requested that counsel undertake these appeals." (Emphasis in original.) Respondent did not attempt to contact McKee or Porco regarding his written representations or their motion dismissing the appeals. McKee and Porco subsequently filed on January 25, 2000, a "Letter of Opposition" to respondent's January 20, 2000, motion with the Court of Appeal.

Respondent sent Porco a letter on January 28, 2000, urging him to continue with the appeal. So far as the record shows, this was the first communication made by respondent to either party since the April 15, 1999, conversation with Porco in the courtroom hallway. In the letter, respondent advised Porco that McKee was not acting in his best interests by attempting to dismiss the appeal, and that Porco should not have any further contact with her, and should only discuss the matter directly with respondent.

On February 4, 2000, Porco sent respondent a letter, in which he again stated that he did not want an appeal and that he was not acting under anyone's influence. Porco repeated that he no longer wanted representation by respondent, and that Porco had never given respondent express verbal or written consent to pursue an appeal. Porco made another request for respondent to sign a substitution of attorney form. McKee also sent a letter to respondent dated February 4, 2000, in which she reiterated that respondent had been terminated, that she did not want an appeal, and requested he sign and return the substitution of attorney form sent to him on December 23, 1999. Again, respondent failed to comply with that request.

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[8]The record below reflects that, at the time of the State Bar Court hearing, Porco was elderly and his hearing was impaired. McKee also testified at the hearing that she was dyslexic.

Respondent did not make any attempt to communicate with either Porco or McKee following the February 4, 2000, letters. On that same date, and on behalf of himself, Porco, and McKee, respondent filed in the Court of Appeal a declaration in response to the "Letter of Opposition" that had been filed by McKee and Porco on January 25, 2000, and requested it be stricken. In this filing, respondent represented to the court that "Mr. Porco has never requested that his appeal be dismissed." Respondent also stated that the first time he became aware McKee might want the appeal dismissed was in December 1999, when he was preparing the Appellants' Opening Brief.

Also on February 4, 2000, the Court of Appeal issued an "Order Reinstating the Appeal of James C. Regan." That order vacated the order issued January 5, 2000, that had dismissed the entire appeal, but did not vacate the order dismissing McKee's and Porco's appeal. The court noted that because respondent was a named appellant, and was personally liable for the award against him, he should be permitted to pursue his own appeal. The Court of Appeal allowed respondent, within 30 days, to submit another brief on his behalf, as the previous brief presented issues that also pertained to McKee and Porco.

Subsequent to that order, Porco and McKee filed "Protest Letters" with the Court of Appeal on February 7, 2000, requesting the Court to honor the December 7, 1999, motion to dismiss the appeal filed on February 19, 1999, and the supplemental notice of appeal filed April 30, 1999; which the Court granted. McKee also sent a letter to respondent on February 21, 2000, in which she repeated her request for respondent to return a substitution of attorney form, and emphasized that she and Porco had fired respondent.

On February 22, 2000, respondent filed a Motion to Reinstate, Sever and Stay the appeals of appellants Porco and McKee. In the motion, respondent again stated that neither Porco nor McKee wanted the appeal dismissed and made further comments on McKee's mental capacity. In his declaration to this motion, respondent stated that he "honestly [did] not believe they want

their appeals dismissed." Respondent did not notify either client that the motion had been filed, or attempt to make any contact with either party. At the State Bar Court hearing below, respondent continued to assert that he pursued the appeal on behalf of McKee and Porco because he believed it to be in the best interests of his clients.

Respondent had previously made attempts to collect his legal fees from Porco's insurance company for the work he conducted regarding the appeal. On March 24, 1999, respondent contacted Allstate Insurance regarding a new claim on behalf of Porco. Allstate informed respondent that he needed to forward a letter of representation to them, as well as a copy of the lawsuit and judgment. Respondent never complied with that request. In January 2000, an associate from respondent's office forwarded a letter to Allstate requesting payment for legal fees that had accrued in connection with the work conducted regarding Porco's appeal. In response, Allstate notified Porco that respondent never sent the letter of representation, and that it had not had any contact from respondent since the March 1999 request for payment.

Porco and McKee filed a complaint with the State Bar on January 12, 2000. After an investigation by the State Bar, a five-count Notice of Disciplinary Charges (NDC) was filed on March 20, 2002, alleging that respondent violated Business and Professions Code section 6104[9] by appearing for a party without authority when he pursued an appeal after being advised by his clients to cease pursuing the appeal on their behalf; that he violated section 6068(m) when he failed to respond to his clients' inquiries regarding his pursuit of the unwanted appeal from May 6, 1999, until February 4, 2000, and failed to inform his clients that he requested numerous extensions of time to file the appeal, and the ultimate filing of the Appellants' Opening Brief; that he failed to release his clients' file upon termination of employment violating Rule of

[9]Unless noted otherwise, all further references to sections refer to provisions of the California Business and Professions Code.

Professional Conduct, rule 3-700(D)(1);[10] that he violated section 6068(d) by employing means inconsistent with the truth, and sought to mislead a judge when he stated in declarations, under penalty of perjury, that his clients wanted to pursue the appeal, and that he failed to advise the Court of Appeal that his clients had attempted to substitute him out of their lawsuit; and finally, that he violated section 6106 by committing an act involving moral turpitude when he falsely represented to the Court of Appeal that he had authority to pursue the appeal.

Both McKee and Porco testified at respondent's disciplinary hearing. Respondent was the only witness who testified on his behalf, and no evidence of any mitigating circumstances was offered at the time of the hearing. The Hearing Judge did consider in mitigation respondent's 17 years of practice free of any discipline. In aggravation, the Hearing Judge considered that respondent engaged in multiple counts of misconduct and that respondent had made disparaging remarks about his clients in his pleadings to the State Bar Court. The stress respondent caused to his clients by his misconduct was also considered.

The Hearing Judge found respondent culpable of all five counts and recommended that respondent be suspended for two years, stayed, and placed on probation for two years, with conditions, including seventy-five days of actual suspension.

II. DISCUSSION

A. Count One: Appearing for Party without Authority (Bus. & Prof. Code § 6104)

Respondent was charged in count one of the NDC with appearing for a party in the Court of Appeal without authority in violation of section 6104. The section provides: "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension."

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[10]Unless otherwise noted, all further references to rules refer to provisions of the California Rules of Professional Conduct.

Respondent argues that he did not violate section 6104 because 1) filing notices of appeal, requests for extensions, motions, and the Appellants' Opening Brief are not appearances; and 2) he had express authority to pursue the appeal on behalf of Porco and McKee.

Respondent claims that an "appearance" consists solely of answering, demurring, moving to strike or transfer, giving written notice of appearance, participating in a trial or hearing, or an order to show cause. Respondent cites to *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, as support that the above list is exhaustive, and therefore the filing of an appeal cannot be considered an appearance. However, the above list refers to actions that are considered appearances by a *defendant*. (See, *Lyons v. State of California* (1885) 67 Cal. 380, 384.) Further, it is not exhaustive of what may constitute an appearance for either a defendant or a plaintiff.

An "appearance" is not limited to standing in front of a judge. (*Lyons v. State of California*, *supra*, at p. 384.) "A general appearance occurs where a party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act. [Citations.]" (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756.)

It is settled that filing a complaint with a superior court constitutes an appearance within the meaning of section 6104. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 577.) Here, respondent filed a notice of appeal, initiating an appellate proceeding in the same way a complaint would initiate litigation. After initiating that process, respondent filed numerous extension requests, eventually leading to the filing of the Appellants' Opening Brief. Each request for an extension of time in which to file the Appellants' Opening Brief was associated with the perfection of the filing of an appeal and constituted an appearance before the court.

Respondent's second contention is that he had express authority to file and pursue the appeal. Respondent argues that the checks delivered to him by Porco and McKee with "For Appeal" on the memo line is prima facie evidence that he had his clients' approval to initiate and continue to pursue the appeal.

The Hearing Judge resolved the issue of credibility regarding the purpose of the checks in favor of respondent. The Hearing Judge was in the best position to determine witness credibility and great weight is given to his findings on this subject. (Rules Proc. of State Bar, rule 305(a); *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 143, fn.7.) We agree with the judge's finding on this issue. The explanation that Porco and McKee offered the checks as a loan to aid respondent with his mortgage is unlikely. The notations on the checks, the timing of the checks following the SLAPP suit award, and the fact that they were written for the exact amount of the filing fees, lead us to believe that Porco and McKee initially gave respondent authority to pursue the appeal. However, it is also clear that the clients terminated that authority and did so decisively.

We have the duty to independently review the record to make findings of fact and conclusions of law. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 346-347.) Although the Hearing Judge concluded that McKee's and Porco's testimony regarding initiating the appeal was not credible, he found clear and convincing evidence to establish that respondent had been notified to stop pursuing the appeal on behalf of his clients. We agree with the judge's assessment.

Receiving authorization to initiate an action does not insulate from culpability an attorney who continues to pursue the claim against a client's wishes. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 339.) McKee testified that she told respondent, during a phone call on February 18, 1999, that she did not want to pursue the appeal.

While this conversation might not stand on its own, we find clear and convincing evidence to support that neither client wanted to continue pursuing the appeal.

On May 6, 1999, McKee and Porco wrote a letter to respondent in which they expressly told him they did not want to pursue the appeal. Respondent continued to file four requests for an extension of time though October 29, 1999. On November 17, 1999, Porco sent another letter stating he did not want to pursue an appeal. McKee followed with a similar letter to respondent on December 7, 1999. After receiving clear notification from his clients that they did not want to pursue the appeal, respondent filed the Opening Appellants' Brief on December 15, 1999.

Respondent claims that he was bound by the prescripts set forth in rule 3-700(A)(2), and therefore is not culpable for continuing to make appearances on behalf of his clients. Rule 3-700(A)(2) requires that an attorney "shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." It is settled that an attorney's obligation to avoid prejudice also extends to an attorney who has been terminated. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 374.) It is also settled that an attorney has the duty to avoid foreseeable prejudice to the client's interest until a substitution of counsel is filed. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280.) Once respondent was discharged on December 23, 1999, his duty under rule 3-700(A)(2) was to properly remove himself as attorney of record as it was clear that his clients wanted to abandon their legal claim. Instead, he actively worked against the direction of his clients by attempting to have the appeal reinstated with his clients as named parties.

The right to pursue an appeal rests entirely with the client, and where it is shown that the attorney acted without authority, the appeal will be dismissed. (See *Title Ins. & Trust Co. v. California Development Co.* (1914) 168 Cal. 397, 401.) Porco and McKee made numerous

express statements that they wanted no part of an appeal, yet respondent claims he pursued the appeal because he *believed* that, despite their express direction to the contrary, they really wanted to pursue the appeal. Porco and McKee had the prerogative to stop pursuing their appeal for any reason, including the desire to minimize their financial cost, whether or not respondent believed it to be in their best interests. By respondent's reasoning, no client would have the ultimate right to dismiss an attorney with or without cause as established by *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790. Extending his reasoning further, an attorney would be allowed to pursue legal claims over a client's objection if the attorney believed the client's reason to stop the claim was not legitimate. Manifestly, existing law fails to support such a position.

Moreover, this record shows by respondent's own testimony, his recognition in hindsight, that, at least, an ambiguity arose as to his authority to pursue the appeal for Porco and McKee and that he failed to timely resolve that ambiguity. However, this was not an ambiguity but was the express direction by respondent's clients to cease pursuit of the appeal on their behalf.

We find clear and convincing evidence that respondent continued to pursue an appeal on behalf of clients who had expressly asked him to stop. Respondent is therefore culpable for violating section 6104.

B. Count Two: Failure to Communicate (Bus. & Prof. Code § 6068(m))

Section 6068(m) states that an attorney must "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

Respondent violated this section when he failed to respond to several letters from his clients in which they expressly asked to be informed of their attorney's intentions regarding his continued pursuit of the appeal. Each letter reflected Porco's and McKee's increased frustration with their attorney regarding his actions and lack of communication. Their requests were

reasonable, given the continued perception that their attorney was acting against their wishes. (Cf. *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 519.)

Respondent contends that he did respond to those status inquiries by filing extensions and the Appellants' Opening Brief. This is without merit. Each letter respondent received from his clients specifically requested respondent to inform them of his actions. There is no evidence that documents any communication made by respondent as an answer to his clients' requests.

Further, respondent undercuts his position as to this count by asserting that he continued pursuing the appeal because he believed that was what his clients really wanted, even though he had received several express and written demands to stop the appeal. Assuming, *arguendo*, that to be the case, then respondent had all the more reason to inform his clients' that he intended to continue to pursue the appeal on their behalf.

If respondent was concerned that his clients were incapable of making informed decisions because of alleged mental challenges, that alone should have provided additional incentive to respondent to maintain regularized, documented communications with his clients. Respondent made no attempt to discuss with his clients why it would be in their interests to continue the appeal, or to find out why they wanted the process stopped until the January 28, 2000, letter to Porco, over ten months after their April 15, 1999, conversation.

We agree with the Hearing Judge's conclusion that respondent violated section 6068(m).

C. Count Three: Failure to Return Clients' Property (Rule 3-700(D)(1))

Rule 3-700(D)(1) provides that an attorney "whose employment *has terminated* shall. . . [¶]. . .promptly release to the client, at the request of the client, all the client papers and property." (Emphasis added.) Respondent asserts that he was under no obligation to return the file to his clients until he received notice that he was terminated on December 23, 1999, and that no culpability can be found because the charge against him was based on Porco's request for the

file on April 15, 1999. We disagree.

A client's file, absent uncommunicated attorney work product, is the property of the client and must be surrendered to the client promptly upon request once the representation has been terminated. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 655.) Porco testified that he requested the case file on April 15, 1999, and both Porco and McKee requested the file in subsequent letters before they fired respondent. An express element of a rule 3-700(D)(1) violation is the client's making of a request for the return of the property. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536.)

Porco and McKee were clearly dissatisfied with respondent, and McKee had made an attempt to substitute herself in pro. per. as early as March 1, 1999. While it is conceivable that respondent frustrated the attempts by his clients to substitute him out as their attorney by ignoring their requests, we find that the evidence supports that respondent's services were terminated on December 23, 1999. Although no request for the clients' file was made after that date, respondent was obligated to follow the directives of rule 3-700(D)(1) on and after December 23, 1999. It should be unnecessary for a client who has already requested return of papers and property prior to the attorney's discharge to be required to repeat that request after discharge in circumstances such as the ones before us. Accordingly, we uphold the hearing judge's conclusion that respondent is culpable of a wilful violation of rule 3-700(D)(1).

D. Counts Four and Five: Employing Means Inconsistent with the Truth; Misleading a Judge (Bus. & Prof. Code section 6068(d)), and Commission of Act Involving Moral Turpitude (Bus. & Prof. Code section 6106)

Respondent was charged in count four of employing means inconsistent with the truth and seeking to mislead a judge in violation of section 6068(d), and he was charged in count five of committing an act involving moral turpitude in violation of section 6106. Section 6068(d)

provides: "To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." We agree with the Hearing Judge's conclusion that respondent violated section 6068(d).

Respondent's violation of section 6068(d) provides the basis for his culpability regarding section 6106. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Section 6106 is violated when an attorney commits "any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not."

The presentation to a court of a statement of fact known to be false "presumes an intent to secure a determination" based upon the statement and is a violation of this section. (*Davis v. State Bar* (1983) 33 Cal.3d 231, 239-240; citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144.) Here, respondent made a representation in his motion to vacate filed on January 20, 2000, that Porco and McKee did not actually want the appeal dismissed. By that date, respondent had received written confirmation that his clients did not want to pursue an appeal, and that they had terminated his services as of December 23, 1999. In spite of that knowledge, respondent proceeded to file the motion with the intention to have the appeal reinstated.

In addition, respondent stated to the Court of Appeal in his February 4, 2000, declaration that "Mr. Porco has never requested that his appeal be dismissed." Clearly, respondent intended the court to consider the assertion that his clients wanted to pursue the appeal, and that Porco had never asked the appeal to be dismissed, in making its decision whether or not the appeal should be reinstated. Respondent's representations to the Court of Appeal that his clients wanted to pursue the appeal are, at a minimum, deceptive. A member of the State Bar "should not under any circumstances attempt to deceive another person," whether or not any harm is done, and an

attorney's practice of deceit involves moral turpitude. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253.)

Respondent also failed to disclose to the court that he had been fired as of December 23, 1999, making a further false representation to the appellate court. (See *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709 [concealment of a material fact misleads a judge just as effectively as a false statement].)

Respondent contends that, because the Hearing Judge found respondent's actions were misguided, and that he did not pursue the appeal with malicious intent, he cannot be found culpable for violating section 6016. Respondent asserts that a finding of good faith cannot co-exist with moral turpitude.

The Hearing Judge concluded that respondent honestly believed he was acting in his clients' best interests. However, the Hearing Judge also concluded that respondent's honest belief was unreasonable and "clouded" his conduct regarding his role as an attorney. An attorney who makes a false statement to a judge is not exculpated based merely on an intuitive belief that he is acting in his clients' best interest.

We acknowledge that the nature and scope of the representation undertaken by respondent drastically changed. We also acknowledge that Porco and McKee were difficult clients. However, we find that respondent did not act in good faith when he attempted to have Porco's and McKee's appeal reinstated after he was allowed to pursue the appeal on his own behalf. At that point, the only legitimate reason respondent could have had to include Porco and McKee in the appeal was to reduce respondent's financial burden of responsibility for the judgment and to offset the costs associated with the appeal. This is demonstrated by respondent's attempt to recover the costs from Porco's insurance company as late as January 4, 2000. Respondent had already been fired, and had been directed to stop pursuing the appeal on behalf of his clients as of May 6, 1999, because they did not want to bear any of the costs

associated with an appeal.

We find clear and convincing evidence that respondent violated sections 6068(d) and 6106. Although the facts are the same supporting the section 6068(d) and section 6106 (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221) we will not ascribe additional discipline based on respondent's section 6106 violation.

E. Respondent's claim of judicial misconduct

Respondent claims that the Hearing Judge was tainted by bias and participated in an ex parte communication with the State Bar's trial attorneys. Respondent contends that this misconduct resulted in a denial of due process.

Respondent has offered no evidence and hardly any specifics to support his allegations of bias. The burden of showing a claim of bias or prejudice rests on the complaining party. (*Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893; cf. *In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 228-229.) Further, respondent asserts that the Hearing Judge made numerous errors of law based on this alleged bias. This is without merit. Even if a judge makes numerous mistakes as to questions of law, that does not form a ground for a charge of bias and prejudice. (*Ryan v. Welte*, *supra*, 87 Cal.App.2d at p. 893.)

Respondent also asserts that the Hearing Judge erroneously admitted hearsay evidence and relied on false statements contained within that evidence to make his findings of fact. Respondent has not identified what evidence was admitted as hearsay over his objections. Upon our review of the record, we find respondent failed to object to the admission of all but one of the letters written to him by Porco or McKee. Where respondent did not object to the admission of evidence, it is well settled that any objection on that point has been waived. (*In the Matter of Kaplan*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 522.) Porco's November 17, 1999, letter to respondent was admitted for all purposes over respondent's objection. However, we do not find the admission of this letter to be erroneous. Porco identified himself as the author of that letter.

Further, Porco testified at length on direct and cross examination regarding the contents of all his letters, including the November 17, 1999, letter. (See Evid. Code, § 1237(a) [past recollection recorded exception to hearsay rule].)

III. DISCUSSION OF DISCIPLINE

A. Levels of Discipline

In making a recommendation of discipline, our primary concern is the protection of the public and maintaining high professional standards by attorneys (*King v. State Bar* (1990) 52 Cal.3d 307, 315; Rules Proc. of State Bar, tit.IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.3.)[11] We look to the Standards for Attorney Sanctions for Professional Misconduct and relevant case law for guidance in determining the appropriate level of discipline. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) The standards are guidelines which must be construed in relation to decisional law. (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550.) The standards applicable to the culpability found in this case are standards 2.3[12], 2.6[13], and 2.10[14]. These standards provide for a range of misconduct from reproval to disbarment.

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[11]Unless otherwise noted, all further references to standards refer to provisions of the Attorney Sanctions for Professional Misconduct.

[12]Standard 2.3 provides in relevant part: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

[13]Standard 2.6 provides that violations of sections 6068 and 6104 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . ."

[14]Standard 2.10, which applies to violations of rule 3-700(D)(1), provides for "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . ."

However, standard 1.6(a) provides in part that "[i]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions." Thus, standards 2.3 and 2.6, providing for suspension or disbarment, should be applied in this case.

The gravamen of respondent's misconduct is his repeated appearances on behalf of his clients' without their authority and respondent's attempts to mislead a judge. Standard 2.6 provides: "Culpability of a member of a violation of [6068(d) and 6104] shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. . . ."

In the following cases of an isolated false statement or misrepresentation to a court, prior to the adoption of the Standards, public reproval has been imposed.

In *Mushrush v. State Bar* (1976) 17 Cal.3d 487, the attorney had no prior record of discipline. He made false statements during a bankruptcy proceeding when he failed to inform the bankruptcy court regarding the amount of a payment made to a debtor from the sale of real property. The Court concluded that the attorney's denial of knowledge of the size of the check involved moral turpitude.

In *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, the attorney misled a bail commissioner by failing to disclose the facts surrounding his attempts to obtain bail for a client in a criminal case. The Court concluded that the concealment of a material fact was as misleading as explicit false statements and required discipline; however, the Court considered that the attorney had no prior record of discipline in mitigation.

In *Mosesian v. State Bar* (1972) 8 Cal.3d 60, the attorney knowingly made false statements during his testimony as a witness in a civil action regarding the general reputation of his aunt. He named several people with whom he allegedly had discussions about his aunt as the basis for his testimony, which was later controverted by every person he identified. While the

Court only imposed a public reproval, it took particular notice of the heightened duty of an attorney to be candid and never seek to mislead. (*Id*. at p. 66.)

Finally, in *Grove v. State Bar* (1965) 63 Cal.2d 312, an attorney concealed from a judge, in court, that the absent opposing attorney had requested a continuance. The Court found that the concealment of the request was a violation of sections 6068(d) and 6106, because it misled the judge just as effectively as a false statement conveying that there was no request for a continuance would have done. However, the court did not find that the attorney planned to mislead the judge and it appeared that Grove's conduct may have been spur of the moment and overzealous.

Other cases of misrepresentation have resulted in greater discipline.

In *Drociak v. State Bar* (1991) 52 Cal.3d 1085, the Supreme Court imposed an actual suspension of thirty days for violating sections 6068(d) and 6106. In *Drociak*, an attorney was hired in March 1985 to represent a woman in a personal injury action. The attorney had the client sign undated and blank verification forms. During 1986, the defendant sought discovery through interrogatories. After a long period without contact with his client, the attorney answered the interrogatories himself and attached one of the pre-signed verifications. The suit was dismissed in November 1986. When the client's husband inquired as to the status of the lawsuit in late 1986 or early 1987, the attorney informed him the suit had been dismissed because of his wife's failure to cooperate. The attorney was then informed that his client had been dead since October 1985. In aggravation, the Court considered the attorney's practice of having other clients sign blank verifications and that his use of pre-signed verifications posed a threat to the administration of justice. The Court also considered the attorney's lack of remorse for his actions. In mitigation, the Court considered the attorney's twenty-five years of practice free of discipline.

In *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, we recommended two years' suspension, stayed, on conditions including six month's actual

suspension. In *Farrell*, the attorney, inter alia, wilfully misled a judge by stating that a witness had been subpoenaed to appear when the witness, in fact, had not yet been subpoenaed. We considered the attorney's prior act of misconduct in aggravation, which involved appearing without authority on behalf of a client, in making our recommendation.

Increased discipline was imposed on an attorney who violated sections 6068(d) and 6106, among other violations, in *Levin v. State Bar* (1989) 47 Cal.3d 1140. In *Levin*, while attempting to settle a lawsuit, an attorney made false statements of fact to an opposing counsel, settled a second lawsuit without his client's permission, and failed to deliver the settlement funds to the client. In making its recommendation, the Court considered that Levin's multiple acts of misconduct outweighed the mitigating effect of his eighteen years of practice prior to discipline and warranted higher discipline. The Supreme Court of California placed the attorney on three-years' suspension, stayed, and imposed six months' actual suspension.

Past cases finding a violation of section 6104 have resulted in disbarment, as the past cases here involved other misconduct which was extremely serious and often aggravated. (See, e.g., *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 [attorney culpable of thirteen counts of aggravated misconduct over a four year period which began less than two years after admitted to practice law and involved considerable dishonesty and overreaching]; *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390 [attorney engaged in multiple acts of aggravated dishonest misconduct over a several-year period starting just four years after her admission to the State Bar]; *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96 [attorney's misconduct included a misappropriation of a large amount of funds and had a prior suspension for trust account misconduct]; *In the Matter of Taylor*, *supra*, 1 Cal. State Bar Ct. Rptr. 563 [attorney's misconduct included misconduct in four matters and concealment from clients that he was not entitled to practice law; attorney defaulted and pending disciplinary proceedings resulting in disbarment rendered our disbarment recommendation moot].) Although the above cases all involve a violation of section 6104, they

also involve other acts of far more serious misconduct with more egregious aggravation than respondent's conduct in the present case.

B. Mitigation

In order to assess the degree of discipline, we cannot rely on a fixed formula. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055.) We must consider each case on its own facts as well as the evidence in mitigation and aggravation. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 24.) The Hearing Judge found respondent's 17 years of practice without discipline in mitigation of his conduct. We agree. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over ten years of practice before first act of misconduct given significant weight]; Std. 1.2(e)(i).) Respondent offered no other mitigating evidence.

C. Aggravation

In aggravation, we find that respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii); see *Davis v. State Bar* (1983) 33 Cal.3d 231, 241.) Respondent, in furtherance of pursuing the appeal, made numerous appearances on behalf of his clients without their authority, and at the same time failed to respond to his clients' reasonable status inquires. Under any version of the facts, respondent's misconduct was not isolated.

We also find that respondent engaged in bad faith tactics by making disparaging remarks about his clients in his pleadings to the Hearing Department. (Std. 1.2(b)(iii).) Respondent made unsupported claims that his clients were mentally ill and senile. Respondent's unsupported assertions demonstrate a lack of appreciation for his conduct and obligations as an attorney. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.)

We also find that respondent's conduct significantly harmed his clients. (Std. 1.2 (b)(iv).) Respondent's persistence in pursuing an unwanted claim created a situation in which his clients were unduly burdened emotionally by the fear of increased costs connected with an appeal that they did not want to pursue.

In addition, respondent has demonstrated a lack of insight regarding the seriousness of

his misconduct. (Std. 1.2(b)(v).) Respondent continues to claim that he pursued the appeal because he knew what was best for his clients despite express demands by his clients to stop. Respondent has also failed to understand that filing requests for an extension of time to file the appeal without notification to his clients was not an appropriate response to his clients' requests to inform them of his actions.

In severity, the present case is in between the isolated false statement reproval cases and the six-month actual suspension cases of *Levin* and *Farrell*, discussed, *ante*. We agree with the Hearing Judge that 75 days actual suspension on the conditions stated below is adequate and appropriate to impress upon respondent the seriousness of his actions. Accordingly, we adopt the Hearing Department's recommendation, although we additionally recommend compliance with the provisions of rule 955, California Rules of Court.

IV. FORMAL RECOMMENDATION

We recommend that respondent James Carlise Regan be suspended from the practice of law in the State of California for two years, that execution of this suspension be stayed, and that respondent be placed on probation for two years on the following conditions: that he be actually suspended for the first seventy-five (75) days of the period of his probation and comply with the remaining conditions of probation adopted by the hearing judge in his decision.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

VI. RULE 955

We recommend that respondent be required to comply with the provisions of California

Rules of Court, rule 955 and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

STOVITZ, P.J.

We concur:

WATAI, J.
EPSTEIN, J.

Case No. 00-O-10318

In the Matter of James C. Regan

Hearing Judge

Hon. Robert M. Talcott

Counsel for the Parties

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